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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 645

IVAN C. McLEOD, Regional Director of the National Labor Relations Board for the Second Region,

Petitioner,

—v.—

GENERAL ELECTRIC COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF GENERAL ELECTRIC COMPANY IN OPPOSITION

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Statement of the Case

Preliminary Statement

This proceeding became moot on October 14, 1966, when the parties concluded the negotiations which were the subject of this proceeding, by reaching a new 3-year collective bargaining agreement. The agreement, which will not expire until October 26, 1969, has been reduced to writing and signed.

Moreover, the petition for a writ of certiorari in this case at no time, we submit, presented a question requiring or worthy of review by this Court.

The Underlying Facts and the Issue as Presented to the Courts Below

General Electric Company (hereafter the Company) and the International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereafter the IUE or the Union) have been parties to a collective bargaining relationship with each other for over 15 years. During all of the time prior to 1966, the IUE Negotiating Committee has been composed exclusively of members or officials of IUE and of IUE professional consultants (44a-48a).* The bargaining has been confined in its application to units represented either by the IUE International or by its locals.

In 1966 the IUE, acting as part of an eight-union coalition initiated by the AFL-CIO, tried to change this established pattern. Its first step on this road was to join the coalition as a charter member and to pledge itself with the other unions there represented[1] to a unity program whereunder all members were to "think" together, "plan" together and "act" together (554a). Its next step, taken in concert with its co-pledgors to unity, was on at least two occasions to demand joint bargaining for all unions to supplant the individual union bargaining which theretofore had prevailed in accordance with the certifications of

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* References with the suffix "a" are to the appendix to the Company's brief in the Court of Appeals. References to "Petition" are to the Government's Petition for a Writ of Certiorari.

[1] Each of the other unions (or constituent locals thereof) represented Company employees in separate units for which they had bargained separately in the past. They are International Brotherhood of Electrical Workers (IBEW), International Association of Machinists (IAM), Sheet Metal Workers (SMW), Allied Industrial Workers (AIW), United Auto Workers (UAW), American Federation of Technical Engineers (AFTE) and Flint Glass Workers (FGW).

the National Labor Relations Board and the practice of the parties. The Company, acting within its rights (670a), rejected both attempts.

On April 13, 1966, IUE purported to abandon the joint approach and wrote the Company that it would not "pursue the matter any further and will abandon any suggestions for any such joint meeting or for joint discussions" (460a).[2]

The Company welcomed this return to the traditional pattern of bargaining and promptly arranged for a pre-negotiations discussions meeting on May 4, 1966.

At that meeting IUE brought with it, in addition to its traditionally composed committee, representatives of the very coalition unions with which it had formally pledged unity and with which it had assured the Company it no longer intended to combine for the purpose of joint bargaining. As noted in the Petition herein (p. 7), several of these seven were wearing lapel buttons bearing the insignia of their respective unions of origin.

The Company refused to meet with the committee so long as the representatives of the other unions were present; and the Section 10(j) proceeding arose solely because

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[2] Shortly after this disclaimer, on April 25th, Local 320 of the IUE, which is the certified bargaining representative in the Company's Syracuse, New York plant, and whose chief executive officer is a long time member of the IUE-GE Conference Board and negotiating committee (65a, 153a-154a), notified its members under the banner "Unity Still In Effect" that "the eight unions dealing with General Electric still are abiding and will abide by their unity resolutions; and that is for no one to sign a contract with General Electric until all parties sign" (569a). On March 3, 1966, Mr. John H. Callahan, Chairman of the IUE-GE Conference Board and its negotiating committee, at a press conference on the coalition's unity program had stated: "We don't sign with G. E. until all sign" (575a).

of the Union's insistence on the inclusion of the outside union representatives in the IUE-GE bargaining relationship and of the Company's resistance thereto.

The Board, accepting the Union's charge of refusal to bargain against the Company based on the facts summarized above and rejecting the Company's charge against the Union based on the same facts, issued a complaint against the Company and initiated this proceeding for a Section 10(j) injunction (29 U. S. C. §160(j)).

There has been no trial of the merits of this case before the National Labor Relations Board and, of course, no decision thereof on the merits. By the same token, there has been no Court of Appeals review of the questions involved in the case and no court enforcement order. Instead, by recourse to Section 10(j), the Board sought and the District Court granted an injunction *before* trial and *before* review providing all of the relief the Board could have sought if it had tried the case, decided it, and been sustained by a Court of Appeals. In following this procedure, the Board and the District Court had, until reversed by the Court of Appeals, upset the long established bargaining pattern between the parties.

Had this case presented a claim of conduct establishing a wilful violation of settled law, Petitioner's resort to Section 10(j) would at least have been consistent with its own public declarations that the section was to be used "not as a broad sword, but as a scalpel" in cases of "flagrant" acts or "wilful and calculated" violations (see 27 *Annual Report of the Board,* p. 4 (1962); Statement of Frank W. McCulloch, Chairman of the National Labor Relations Board, *The National Labor Relations Board in*

Action, before the Eighth Annual Joint Industrial Relations Conference, Michigan State University, April 19, 1962; Statement of Board Member Fanning, before the Ninth Annual Industrial Relations Conference of Electronic Industries Association, March 1962) and with its own petition, which (13a) alleged the violation here to have been a "flagrant" one. Even in that event it would have had to bring itself within the statutory requirement of showing that the extraordinary relief here sought was "just and proper" in light of the facts of this case.

But the basic legal question on which the claimed violation depended, as noted by the Court of Appeals, "is a difficult one to resolve and one which no court has considered" (Petition, p. 23). It is in a developing field of law wherein the precedent nearest to the case at bar is a Labor Board decision which is about to be but has not yet been reviewed by the Court of Appeals for the Sixth Circuit (*American Radiator & Standard Sanitary Corp.*, 155 NLRB No. 69, 60 LRRM 1385 (1965)). The novelty of the question is attested by the close interest of the labor bar in the ultimate resolution of this developing phase of the law (1966 Report of the Section of Labor Relations Law of the American Bar Association, p. 422).

A more inappropriate vehicle than this case for review of the standards applicable to Section 10(j) injunctions would be difficult to imagine. For under *any* appropriate standards—and certainly under those which the Board has set for itself both outside the confines of this case and in its pleading here—the Section was not intended to substitute District Court appraisal in a motion part for National Labor Relations Board trial and Court of Ap-

peals review in a case where the question whether the facts establish *any violation of law at all* is open to grave doubt.

When there is added to what we have just said the additional and admitted circumstances (Petition, p. 12) that this threshold intervention was not sought to ward off irreparable harm to Petitioner and that it not only was not designed to preserve the *status quo* existing before the controversy leading to this case arose, but on the contrary, to reverse and upset that *status quo,* the total absence here of any question meriting Supreme Court review is confirmed.

In its present attempt to obtain this Court's review of the Court of Appeals' reversal of the District Court injunction originally granted in this case, the Labor Board has not only abandoned its original allegation of "flagrant" violation by the Company but has basically altered its position concerning the governing tests for the issuance of a Section 10(j) injunction. In fact, if there is any confusion as claimed in the Petition (Petition, p. 12), it arises from the *Petitioner's* shifting of position and its espousal of differing standards at various stages of this litigation.

Questions Presented

In its Memorandum of Points and Authorities submitted in the District Court, the Government stated (Memorandum, p. 3):

> "*As in the case of traditional equity practice with respect to interlocutory relief,* the prerequisite to the granting of the relief contemplated by Section 10(j) is a finding by the District Court that there is reasonable cause to believe that a violation of the Act, as charged, has been committed, *and that the equitable relief is 'just and proper.'*" (Emphasis ours.)

In its brief to the Court of Appeals, the Government stated the issue before that court in the following language (Appellee's brief, p. 18):

> "The issue before this Court is whether or not the court below was clearly erroneous in finding and concluding that there was reasonable cause to believe that a violation of the Act, as charged, has been committed and that an injunction under Section 10(j) of the Act *was just and proper.*" (Emphasis ours.)

The language quoted above is the Board's own statement of the standards to be applied in a Section 10(j) proceeding and is indeed a far cry from the statement of the issue as it appears in the Board's Petition to this Court. Here the Board states the question in the following terms (Petition, p. 2):

> "The question presented is whether the Board is entitled to an injunction where it shows (1) that there

is reasonable cause to believe the Act has been violated, and (2) *that the impact on the public interest will be substantial if the relief is withheld.*" (Emphasis added.)

The attempted substitution before this Court of the standard of "impact on the public interest" in the place and stead of the statutory requirement that the relief be "just and proper" is not only a departure from the position taken by the National Labor Relations Board in the courts below but, as we shall show, is an erroneous attempt to convert Section 10(j) into a statute for curbing emergency strikes involving large employers—a purpose for which it was never intended.

We believe the only questions presented by this petition are 1) has this case become moot and 2) if not, did the Court of Appeals err when it reversed and vacated an injunction under Section 10(j) which a) constituted an intervention on behalf of one of two contending parties to support an unprecedented course of conduct on a legal theory which is at best highly dubious and has not been settled by the courts, b) disrupted the *status quo,* and c) was unnecessary to protect the National Labor Relations Board, as guardian of the public policy of the National Labor Relations Act, from irreparable harm.

We submit, that the answer to the first question just posed should be in the affirmative, and the answer to the second question, if reached, should be in the negative.

Opinions Below

The essence of the District Court's opinion, as far as Section 10(j) is concerned, was that the clarity or flagrancy of the violation sought to be restrained need not be shown because, according to its assertion, "the impact upon the public interest is grave enough to justify swifter corrective action than the normal practice of Board adjudication and court enforcement. The present case, involving a huge and basic enterprise with substantial impact upon the national defense and economy generally seems clearly to qualify." (676a.) While, reasoned the District Court, the statutory charge to the courts to grant such relief "as it deems just and proper" might justify the denial of relief in a "routine" unfair labor practice case, it was not, in the court's view, adequate to offset, by a consideration of general equitable principles, the Board's conclusions, (1) that it had reasonable cause to believe a violation had occurred, and (2) that such putative violation, if permitted to continue, would result in a strike endangering the public interest (677a).

This attempt to substitute the size of the employer and the prospect of a strike as criteria overriding every other pertinent consideration, including the essential soundness of the case on which the Board was proceeding and the respective equities of the parties, was, we submit, not an application of the statute but an amendment of it.

The Court of Appeals reversed and vacated the injunction.[3] Directing its attention to the question whether

[3] At pages 9 to 10 and page 11 of the Petition, it is stated in varied language that the Court of Appeals "did not disturb" the findings of the District Court as to probable violation of the Act, nor as to the gravity of the impact on public interest of failure to

the relief requested by the petition was just and proper, the court stated (Petition, p. 23):

> "We are not convinced that the facts in the present case reveal those special circumstances which must be present before a court will intervene and issue an injunction prior to the Board's hearing and decision. The Board has not demonstrated that an injunction is necessary to preserve the status quo or to prevent irreparable harm."

As viewed by the Court of Appeals, the fact that under the Labor Management Relations Act the District Court had jurisdiction to issue an injunction in a labor situation did not mean that the court was to abdicate its responsibility to look to general equity principles as guides when petitioned to grant preliminary relief. This was especially so where, as here, the claim of violation was grounded on a novel and difficult legal issue. Under such circumstances the court stated (Petition, p. 24):

> "It would be more in keeping with the scheme intended by Congress to have this case, particularly

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grant an injunction. To the extent that this statement may give the impression that the Court of Appeals approved the findings of the District Court on these subjects—we submit that it is misleading. What the Court of Appeals said (p. 22) was as follows:

> "It should be noted explicitly at the outset that with our disposition of this case today we are not passing on the basic controversy between GE and the IUE which Judge Frankel correctly characterized as 'the extent of IUE's right to designate such additional, non-voting members of its Negotiating Committee—or, conversely, of the Company's right to hold such designees unacceptable or impermissible." *The only issue which we decide today is the propriety of the section 10(j) temporary injunction issued against the General Electric Company.*" (Italics ours.)

because of its unusual characteristics, follow the path of Board hearing and decision on the unfair labor practice charges, rather than to short-circuit the established administrative design."

ARGUMENT

I.

This case has become moot.

On October 14, 1966, the Company and the Union's Negotiating Committee jointly announced agreement on the terms of a renewal of their contract which expired on October 2, 1966. This agreement successfully concluded the negotiations which were the subject of this proceeding. (Petition under Section 10(j), par. 4; 11a.) On October 16, 1966, the Union formally ratified the settlement, and on October 28, the agreement was signed, thus concluding national contract negotiations until October 26, 1969. The controlling consideration which moved the District Court in issuing the injunction was to bring the Company to the bargaining table and there reach agreement if possible (676a, 683a). That purpose has now been realized.

As this Court has long held, it is its function to decide actual cases and controversies (*United States* v. *Alaska S.S. Co.*, 253 U. S. 113, 116 (1920)) and "not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it" (*Mills* v. *Green*, 159 U. S. 651, 653 (1895)). We submit that because of the settlement of the underlying dispute herein any decision by this Court would have no meaningful effect on any viable

matter between these parties. See *Oil Workers Union* v. *Missouri,* 361 U. S. 363, 367-369 (1960); *Harris* v. *Battle,* 348 U. S. 803 (1954). Under the circumstances, the petition for a writ of certiorari should be dismissed.

II.

This case never presented any question requiring or calling for review by this Court.

The standard followed by the Court of Appeals in deciding this case and in applying the statutory test of "just and proper"—a test which, as we have seen, was accepted by Petitioner both in the District Court and in the Court of Appeals—in no way created confusion as claimed in the petition for a writ of certiorari.

These words embody the historical tests which traditionally have guided the equity courts in their exercise of the extraordinary power of preliminary injunction. This Court, indeed, so held in *Hecht Company* v. *Bowles,* 321 U. S. 321 (1943). That case involved an application for a preliminary injunction under the Emergency Price Control Act of 1942. The District Court, on the basis of traditional equitable principles, had refused to grant the injunction only to be reversed by the Court of Appeals for the District of Columbia, which construed the Act to *require* the issuance of the injunction once the facts had established the existence of a violation. This Court held that the provisions of the Act in question did not make the issuance of an injunction mandatory and reversed, saying:

> "A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any

> and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice an unequivocal statement of its purpose would have been made" (p. 329).

The Court concluded that it was not the congressional intention in the Act to require the issuance of the injunction as a matter of right and it would not imply an intention by Congress to dispense with the traditional practices of the courts of equity applicable in such preliminary injunction situations (p. 330).

The Court continued by noting that both the agency and the courts were jointly involved in the "war against inflation" (p. 331), which Congress had described as the "most destructive" consequence of war save the loss of human life (*ibid.*). Under such circumstances, while the courts were to administer the law in light of the public interest to be served, they were not to forsake their traditional tests for exercising discretion where injunctions were sought.

The Board in the instant case would have the courts ignore all other relevant equities because of its claim of involvement of the "public interest."

In the final analysis, what the Petition really urges is that this Court should approve the injunction issued by the District Court on the ground that where a strike against a major employer is threatened the courts are to give controlling importance to this threat and to ignore the questions a) whether a violation of law has actually occurred and b) whether the relative equities of the parties justify preliminary injunctive relief.

The threat of a strike if the Company should continue to be unwilling to meet with the IUE's unprecedentedly expanded committee (stressed and restressed both in the District Court opinion and in the Petition for certiorari), was not supported in the record and the *true* threat of strike which inhered in the joint action of the unions to exact an outsize economic settlement was ignored.[4] But the emphasis on the Company's size, and on the implications of a strike against it, was erroneously placed for another and more fundamental reason. Under no standard conceivably to be followed under Section 10(j) could an injunction be issued where the very existence of a violation of law by the Company was subject to the gravest doubt and involved, as the Court of Appeals found, "a difficult [question] to resolve and one which no court has considered."

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[4] The suggestion that such a strike might result seems to have been based on the testimony of Paul Jennings, President of the Union, before Judge FRANKEL (R. 207a), as follows:

> "Q. Mr. Jennings, if the situation continues as it is today, with the company refusing to meet with the designated individuals as they did on May 4, 1966, what would be the consequences, in your opinion, at the time of the expiration of the contract in October of 1966? A. If the company refuses to meet with a committee of the I. U. E., *and if there are no negotiations with a committee of the I: U. E.*, when the contract expires there will be a strike *if there are no negotiations.*" (Italics ours.)

It will be noted that Mr. Jennings did not take the position that a strike would necessarily result from a refusal by the respondent to negotiate with a committee including representatives of other unions, nor did he take the position that IUE would have refused to continue negotiations if such representatives were excluded. Nor has IUE ever taken such a position, so far as the record shows.

Reference is also made to testimony by a Company witness to the general effect that if the *coalition* struck there would be "the greater possibility of a broader strike" (417a). In fact, this broader strike was only narrowly averted by Presidential intervention.

It was the Board's attempt to impose its view of this difficult question on the Company, by District Court action, before a Board trial and before any opportunity for review by the Court of Appeals that led to the reversal here.

Furthermore, the legislative scheme of the Labor Management Relations Act of 1947 clearly establishes that the obstruction to commerce, which might be involved if a strike were called against the Company by the Unions participating in the coalition, was to be eliminated, if at all, pursuant to the provisions of Title II of that Act and, most particularly Section 176 thereof entitled "National Emergencies" (29 U. S. C. §176, *et seq.*). It was clearly the intention of the Eightieth Congress which enacted both the National Emergencies provisions and Section 10(j) that, when national defense or the economy generally—more appropriately the "national health or safety"—is affected by a major strike or lockout, the procedure it provided in Sections 176 to 182 was to be followed. Any attempt by the Government to substitute the procedures of Sec. 10(j) for these sections is entirely without warrant or authority.

The Court of Appeals suggested that in a case like that at bar, the Board should more appropriately expedite its own proceedings, thereby fulfilling its role in the legislative scheme.

The Board's contention that the Congress was moved to enact Section 10(j) because *inter alia* Board procedure for decision and enforcement was too slow, is no answer to the suggestion of the Court of Appeals.

The point of the Court of Appeals' suggestion is that in a novel case, which in the eyes of the Board has great

public importance, the Board should expedite its own machinery so that it can proceed under Section 10(e) instead of 10(j). It could then more appropriately ask the Court to expedite its procedures to review a fully developed Board record. It is clear that the Board could have acted with considerably greater dispatch than it did. Quite apart from the possibility of abridging the more than two months that elapsed between the filing of the Union's charge and the issuance of a complaint, it seems not even to have occurred to the Board, even now—after the Court of Appeals' opinion—that it could have heard this case directly without intervention of a Trial Examiner if it wanted to do so. The Act so provides, 29 U. S. C. §160(c).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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